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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No 1221

FRANK CANNON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit.

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INDEX.

	Page
Citation to Official Report of Opinion delivered in the Court of Appeals for the Seventh Circuit	2
Grounds for the Court's Jurisdiction	2
Questions Presented for Review	2
The Constitutional Provisions and Statutes Involved	3
Statement of Case	6
Argument of Reasons Relied Upon for the Allowance of this Writ of Certiorari	11
I. An owner Who Supervises, or Retains the Right to Supervise the Erection or Construction of a Building on His Premises is "in Charge of" the Work Within the Meaning of the Illinois Scaffold Act and Liable for any Wilful Violation thereof.	11
II. The Defendant Retained Control of the Work by Its Contract with the Stanley Hanks Painting Company.	13
III. More than One Person can be in Charge of the Work Within the Meaning of the Illinois Scaffold Act.	17
IV. The Decision of the District Court and Court of Appeals Nullifies Illinois Scaffold Act by Holding that the Government was not in Charge of the Work Being Done Even Though the Government's Contract with the Petitioner's Employer Expressly Provided that the Government's Contracting Officer Retained General Direction of the Work.	20
Conclusion	24
Opinion of the Court of Appeals for the Seventh Circuit	25

Authorities Cited.

Claffy, v. Chicago Dock & Canal Company, 249 Ill. 210 (1911) 13

Gannon v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 22 Ill. 2d 505, 175 N. E. 2d 785 (1961) 12, 17

Miller v. B. F. Goodrich Company, 295 Fed. 2d 667 (1960) 18

Rovekamp v. Central Construction Company, General No. 48965, Appellate Court of Illinois, First District, Third Division, 195 N. E. 2d 756 (1964) 18

Schmid v. United States, 154 Fed. Supp. 81 13

Schultz v. Henry Eriesson Co., 264 Ill. 156, 106 N. E. 236 11

Shell Oil Company v. Foster-Wheeler Corporation, 209 Fed. Supp. 931 13

Skinner v. The United States, 209 Fed. Supp. 424 18

Taber v. Defenbaugh, 9 Ill. App. 2d 169, 132 N. E. 2d 454 (1956) 13

Yankey v. Oscar Bohlin and Son, Inc., 37 Ill. App. 2d 457, 186 N. E. 2d 57 ..... 13, 18

Statutes Cited.

Section 2 of Article 3 of the Constitution of the United States 3

28 U. S. C. A., Sec. 1346 ..... 2, 4

28 U. S. C. A., Sec. 2674 4

Ill. Rev. Stat., Ch. 48, Sec. 60 ..... 2, 11, 20

Ill. Rev. Stat., Ch. 48, Sec. 64 2

Ill. Rev. Stat., Ch. 48, Sec. 69 ..... 2, 11, 12, 20

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To the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Frank Canon respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, which became final on the 31st day of March, 1964.

OPINIONS BELOW.

The District Court entered Findings of Fact and Conclusions of Law in favor of the Defendant on July 22, 1963 (Pl. Abs. 24). The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 328 Fed. 2nd 763 (7th Circuit 1964) and a copy thereof may be found as an appendix to this petition. The Court of Appeals denied the petitioner's petition for a rehearing on March 31, 1964.

JURISDICTION.

The judgment sought to be reviewed was entered on March 3, 1964 and became final on the 31st day of March, 1964, on the denial of petitioner's petition for a rehearing. This action was brought pursuant to the provisions of Title 28, U. S. C. A., Sections 1346 (b); 2671 et seq.; and 2674, the same being a portion of which is commonly known as "The Federal Tort Claims Act". The plaintiff's amended complaint alleges the plaintiff received serious and permanent injuries as a result of the defendant's violation of the Illinois Structural Work Act (Ill. Rev. Stat. 1955, Ch. 48, Secs. 60, 64 and 69), commonly known as the "Scaffold Act" (Pl. Abs. 19).

The jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

When an owner who supervises, or retains the right to supervise the erection or construction of a building on his premises is "in charge of" the work within the meaning of the Illinois Scaffold Act and liable for wilful violations

thereof, can the Federal Courts nullify this safety act by holding that the Government was not in charge of the work being done even though the Government's contract with the petitioner's employer expressly provided that the Government's contracting officer retained general direction and control of the work?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

"The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority—to all cases affecting Ambassadors, other public Ministers and Consuls—to all cases of admiralty and maritime jurisdiction—to Controversies to which the United States shall be a Party—to Controversies between Citizens of the same State claiming Lands under Grants of different States and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Section 2 of Article 3 of the Constitution of the United States.

The United States as a Defendant.

"(a) The District Courts shall have original jurisdiction, concurrent with the Court of Claims, of:

• • •

(2) (b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death

caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, Sec. 2 (a), 63 Stat. 62; May 24, 1949, c. 139, Sec. 80 (a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, Sec. 50 (b), 65 Stat. 727; July 30, 1954, c. 648, Sec. 1, 68 Stat. 589; July 7, 1958, Pub. L. 85-508, Sec. 12 (e), 72 Stat. 348; 28 U. S. C. A. Sec. 1346.

Liability of the United States.

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." June 25, 1948, c. 646, 62 Stat. 983; 28 U. S. C. A., Sec. 2674.

ILLINOIS STRUCTURAL WORK ACT.

Erection and Construction of Scaffolds, Cranes, Ladders, Etc.

"That all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon. * * *" 1907, June 3, Law of 1907, page 312, Section 1; Ill. Rev. Stat., Ch. 48, Sec. 60.

Enforcement and Actions for Injuries or Death.

"Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this act, shall comply with all the terms thereof. * * *

For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; * * *" As amended 1951, July 11th, L. 1951; p. 1309, Sec. 1; Ill. Rev. Stat., Ch. 48, Sec. 69.

STATEMENT OF THE CASE.

During the summer of 1956, the defendant, The United States of America entered into a written contract with the Stanley Hanks Painting Company for the painting of a specified number of buildings to include Building 203 located at the Granite City Engineer Depot. The contract price was $20,831.00 and the contract and specifications consisted of 46 typewritten pages. On the 21st day of August, 1956, the plaintiff and a fellow workman, John Hendricks, were painting the skylight on Building 203. Building 203 is a building consisting of roofs on two levels, one level being two roofs separated by a skylight and the other level being the roof of the skylight. The plaintiff and John Hendricks had erected a scaffold on the lower roof in order to paint the higher reaches of the skylight. The roof was slanted away from the skylight at a pitch of about one inch to the foot and was surfaced with tar and gravel. The scaffold consisted of two six foot step ladders approximately 18 feet apart. A metal plank approximately 20 feet long, 4 inches thick and 14 inches wide rested on top of the ladders as a pick or walking board. The walking board was not attached to the ladder nor were there any cleats, shoes, points or lashings on the ladders. The ladders rested directly on the roof without any device to shore up the legs resting on the lower part of the slanted roof (Pl. Abs. 31).

On the day prior to the accident the testimony of John Hendricks and William Williams, foreman for Stanley Hanks, was that a government inspector had seen a similar scaffold being used on the same building in a like manner by the plaintiff and John Hendricks. The foreman on the job, William Williams testified that during the course of the contract he was in constant contact with the government inspector. The foreman further said that

the government inspector would inspect the work to see how it was being done and that if something was being done he didn't like or was unsafe, the government inspector would stop the work immediately and require that it be done otherwise (Pl. Abs. 31-32).

The plaintiff went to work at 8:00 A. M., on the morning of August 21, 1956, and worked on the scaffold until approximately 3:15 P. M. At that time the scaffold tipped away from the skylight, toward the slant in the roof and fell. The pick or walking board struck the plaintiff's leg causing a compound fracture of the left leg above the ankle. At the time of trial the plaintiff was still suffering from the effects of his injury and had incurred numerous hospital and doctor bills and had lost considerable time from the pursuit of his occupation as a painter (Pl. Abs. 32).

The contract between the defendant and the Stanley Hanks Painting Company contained among others, the following provisions:

> The work will be conducted under the general direction of the Contracting Officer and is subject to inspection by his appointed inspectors to insure strict compliance with the terms of the Contract. (Specifications, Part II, General Conditions, Section 19) (Pl. Abs. 36).
>
> In addition to full compliance with the requirements of the article of the Contract entitled "Accident Prevention" the Coptractor will comply with the following provisions:
>
> A. Prior to commencement of work the Contractor will
>
> (1) Submit in writing to the Contracting Officer his proposals for effectuating the provisions of the article of the Confract entitled "Accident Prevention".

(2) Meet in conference with representatives of the Contracting Officer to discuss and develop mutual understanding relative to administration of the overall safety program (Specifications, Part II, General Conditions, Section 18 (A)).

B. During the performance of work under the Contract, the Contractor shall comply with all procedures prescribed by the Contracting Officer for the control and safety of persons visiting the job site and will comply with such requirements to prevent accidents as may be specified under the Special Conditions of these specifications or issued by the Contracting Officer (Specifications, Part II, General Conditions, Section 18 (B)) (Pl. Abs. 36).

The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be deemed by him to be necessary or desirable for the convenience of the Government * * * (Specifications, Part II, General Conditions, Section 11) (Pl. Abs. 35-36).

The Government shall have the right to take possession of or use any completed or partially completed part of the work * * * (Specifications, Part II, General Conditions, Section 10) (Pl. Abs. 35).

A. The Contractor is required to submit a work schedule showing the order in which he will start the several salient features (including procurement of materials, plant and equipment) and contemplated date for completing same * * * (Specifications, Part II, General Conditions, Section 5 (A)).

B. If in the opinion of the Contracting Officer, the Contractor falls behind, the Contracting Officer may require him to increase the number of shifts and/or overtime operations, days of work and/or the amount

of construction plant (Specifications, Part II, General Conditions, Section 5 (B)).

C. Failure of the Contractor to comply * * * shall be grounds for determination by the Contracting Officer that the Contractor is not prosecuting the work with such diligence as will insure completion within the time specified. Upon such determination the Contracting Officer may terminate the Contractor's right to proceed * * * (Specifications, Part II, General Conditions, Section 5 (C)) (Pl. Abs. 33).

A. The Contractor will comply with all pertinent provisions of the Manual "Safety Requirements" * * * and will also take or cause to be taken such additional measures as the Contracting Officer may determine to be reasonably necessary for the purpose (Section 31 (A) of the General Provisions).

B. The Contractor will maintain an accurate record of, and will report to the Contracting Officer in the manner and on the forms prescribed by the Contracting Officer, exposure data and all accidents resulting in death, traumatic injury incident to work performed under the Contract (Section 31 (B) of the General Provisions).

C. The Contracting Officer will notify the Contractor of any noncompliance with the foregoing provisions and the action to be taken. The Contractor shall, after receipt of such notice, immediately correct the conditions, such notice when delivered to the Contractor or his representative at the site of the work shall be deemed sufficient purpose. If the Contractor fails or refuses to comply promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken * * * (Section 31 (C) of the General Provisions) (Pl. Abs. 33-34).

> The Contractor will give his personal superintendence to the work or have a competent foreman or superintendent, **satisfactory ~~to~~ the Contracting Officer**, on the work at all times during progress * * * (Section 10 of the General Provisions) (Pl. Abs. 33).
>
> The Contracting Officer may in writing require the Contractor to remove from the work such employees as the Contracting Officer deems incompetent, careless, insubordinate or otherwise objectionable * * * (Section 8 of the General Provisions) (Pl. Abs. 33).

The cause was submitted to the United States Court for the Southern District of Illinois, Southern Division, Judge Omar Poos, Trial Judge, on March 7, 1963. Prior to trial the parties entered into a stipulation that the contract between Stanley Hanks Painting Company and the United States of America may be admitted into evidence without objection (Pl. Abs. 38-39). On July 22, 1963, the Court filed its findings of fact and conclusions of law and entered final judgment in favor of the defendant, dismissing the action and awarding the defendant its costs of action (Pl. Abs. 39-40).

Plaintiff thereafter filed his Notice of Appeal on September 20, 1963 and the United States Court of Appeals for the Seventh Circuit entered judgment and opinion affirming the District Court's decision on March 3, 1964. The Court of Appeals denied the petitioner's Petition for Rehearing on March 31, 1964.

ARGUMENT.

I.

An Owner Who Supervises, or Retains the Right to Supervise the Erection or Construction of a Building on His Premises Is "In Charge of" the Work Within the Meaning of the Illinois Scaffold Act and Liable for Any Wilful Violation Thereof.

The Structural Work Act, commonly known as the Scaffold Act (Chapter 48, Sections 60-69, Illinois Revised Statutes, 1955), was enacted in 1907 to provide for the protection and safety of persons in and about the construction, repair, or alteration of buildings and other structures. Its avowed purpose was "to prevent injuries to persons employed in this dangerous and extra hazardous occupation, so that negligence on their part in the manner of doing their work might not prove fatal." **Schultz v. Henry Ericsson Co., 264 Ill. 156, 164, 106 N. E. 236, 239.** Section 60 of the Act (Chapter 48, Section 60, Illinois Revised Statutes) pertinently provides:

> "Sec. 60. All scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the

falling of any material that may be used or deposited thereon."

Section 9 of the Act (Chapter 48, Section 69, Ill. Rev. Stat., 1955) provides in substance, that any owner or other person having charge of the erection, construction, repair, removal or painting of any building shall comply with the terms of the Act, and provides further that a cause of action shall accrue to any person injured by reason of a wilful violation. Section 9 reads pertinently:

> "Sec. 9. Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, * * * or other structure within the provisions of this act, shall comply with the terms thereof, and any such owner, contractor, sub-contractor, foreman or other person violating any of the provisions of this act shall upon conviction thereof be fined not less than $25, nor more than $500 or imprisoned for not less than three months nor more than two years or both fined and imprisoned in the discretion of the court * * *. For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of these provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby."

Throughout its long history, from **Claffy v. Chicago Dock and Canal Company (1911), 249 Ill. 210** to **Gannon v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company (1961), 22 Ill. 2d 305, 175 N. E. 2d 785**, the nature of the owner's liability under the Scaffold Act was in dispute. The controversy was finally settled by the Gannon case. In that case, our Supreme Court re-examined all prior interpretations of the Act and concluded that

all civil actions were governed by Section 9. And it construed Section 9 to impose liability on those persons "having charge" of the erection or construction of the building project.

In all of the cases, both before and after the Gannon Case, in which the question of control has been discussed, the contractual relationship between the parties has been either the deciding evidentiary fact or one of the main evidentiary facts relied on by the Court in concluding that there either was or was not control. In the case of **Taber v. Defenbaugh, 9 Ill. App. 2d 169, 132 N.E. 2d 454 (1956)**, the Court specifically pointed out the lack of a contract to which it could look and in the absence of the contract was forced to look to the actions of the parties to determine what the relationship was. In **Shell Oil Company v. Foster-Wheeler Corporation, 209 Fed. Supp. 931**, the contract was the deciding factor in holding that there was no control. In **Schmid v. United States, 154 Fed. Supp. 81**, the controlling evidence was the contract between the parties. (It is to be noted that in that case the contract between the Government and the contractor was entirely different than the one involved in this case despite language in the opinion of the District Court.) In **Yankey v. Oscar Bohlin and Son, Inc., 37 Ill. App. 2d 457, 186 N. E. 2d 57**, the Court relied upon the implied contract between Bohlin and Northwestern Excavators.

II.

The Defendant Retained Control of the Work by Its Contract With the Stanley Hanks Painting Company.

It is obvious then that the contract between the defendant and the plaintiff's employer, Stanley Hanks Painting Company, is not only material but decisive of the issue

of control in this case. We submit that by the contract which the defendant prepared and required plaintiff's employer to sign, it effectually retained complete control of the work to be done.

The Government retained the right of general direction of the work, the right to specify at its discretion when the contractor was to do the work, the right to require the contractor to remove employees from the job, the right to determine safety procedures on the job, the right to require additional workers, longer hours and other specific details of the work. Numerous sections of the contract when read together lead to the inescapable conclusion that the Government on the one hand attempted to insulate itself from liability by placing the painting contractor in the position of an independent contractor, but on the other hand kept a tight rein on the work so as to at all times be in actual control.

Though there are many provisions in the contract giving the defendant the right to direct the actions of the Stanley Hanks Company, we feel that the following are of such importance they should be extracted:

> "**THE WORK WILL BE CONDUCTED UNDER THE GENERAL DIRECTION OF THE CONTRACTING OFFICER** AND IS SUBJECT TO INSPECTION BY HIS APPOINTED INSPECTORS TO INSURE STRICT COMPLIANCE WITH THE TERMS OF THE CONTRACT" (Specifications, Par II, General Conditions, Section 19) (Emphasis added.)

> "THE CONTRACTING OFFICER MAY IN WRITING REQUIRE THE CONTRACTOR TO REMOVE FROM THE WORK SUCH EMPLOYEES AS THE CONTRACTING OFFICER DEEMS INCOMPETENT, CARELESS, INSUBORDINATE, OR OTHERWISE

OBJECTIONABLE" (Section 8, General Provisions).

"THE CONTRACTOR WILL COMPLY WITH ALL PERTINENT PROVISIONS OF THE MANUAL 'SAFETY REQUIREMENTS' * * * AND WILL ALSO TAKE OR CAUSE TO BE TAKEN SUCH ADDITIONAL MEASURES AS THE CONTRACTING OFFICER MAY DETERMINE TO BE REASONABLY NECESSARY FOR THE PURPOSE" (Section 31 (a), General Provisions).

"THE CONTRACTING OFFICER MAY ORDER THE CONTRACTOR TO SUSPEND ALL OR ANY PART OF THE WORK FOR SUCH PERIOD OF TIME AS MAY BE DEEMED BY HIM TO BE NECESSARY OR DESIRABLE FOR THE CONVENIENCE OF THE GOVERNMENT" (Specifications, Part II, General Conditions, Section 11).

If not to retain complete and effective control of the entire project, what was the purpose of the Government drafting their contract in such a manner? If they were not to have control over the work, why insert a provision that the work would be conducted under their general directions? Why insert a provision that they could require the contractor to dismiss from the job any employee not satisfactory to them? Why retain the right to stop or discontinue the project for any period of time desired by them?

The Government, in fact, retained control over the specific thing which brought about the injury to the plaintiff. Under the Section 31 (a) of the General Provisions, they required compliance with their published manual "Safety Requirements", wherein we find the following:

"20.33 * * * the supports on which a ladder rests, both top and bottom, shall be rigid, capable of supporting the loads to be imposed and of such a nature

that lateral displacement cannot occur. Cleats, shoes, metal points, lashings, or other suitable devices shall be used to prevent slipping when required."

And again in Section 18, Part II of the Specifications, the Government imposed additional restrictions upon the contractor which effectually placed safety completely under its control.

"IN ADDITION TO FULL COMPLIANCE WITH THE REQUIREMENTS OF THE ARTICLE OF THE CONTRACT ENTITLED 'ACCIDENT PREVENTION,' THE CONTRACTOR WILL COMPLY WITH THE FOLLOWING PROVISIONS:

A. PRIOR TO THE COMMENCEMENT OF THE WORK THE CONTRACTOR WILL

(1) SUBMIT IN WRITING TO THE CONTRACTING OFFICER HIS PROPOSALS FOR EFFECTUATING THE PROVISIONS OF THE ARTICLE OF THE CONTRACT ENTITLED 'ACCIDENT PREVENTION.'

(2) MEET IN CONFERENCE WITH REPRESENTATIVES OF THE CONTRACTING OFFICER TO DISCUSS AND DEVELOP MUTUAL UNDERSTANDING RELATIVE TO ADMINISTRATION OF THE OVERALL SAFETY PROGRAM."

The Government prior to the commencement of the work either approved the use of the defective scaffold or failed to properly exercise the control which they had retained. By means of a 45 page contract the defendant imposed restrictions and conditions upon the contractor which go far beyond those which indicate an interest only in the end product. The Government may impose any condition it desires upon those with whom it contracts, but when it re-

tains in itself the right to interfere, approve, change and direct, it cannot escape liability imposed by Statute upon those who have retained these rights.

III.

More Than One Person Can Be in Charge of the Work Within the Meaning of the Illinois Scaffold Act.

The Scaffold Act deals with dangerous activities and the Legislative design in passing the Scaffold Act was to protect the safety of those engaged in these activities. Even though the law as it has presently evolved, does not place liability without fault, it is clearly the legislative intent to place liability upon those whose right to control or supervise the work being done, makes it possible for them to comply with the provisions of the Scaffold Act and thereby fulfill the legislative purpose. Clearly then, there can be more than one person who has sufficient control to require compliance with the Act.

The holding of the Court in **Gannon v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 22 Ill. 2d 305, 175 N. E. 2d 785,** and decisions since, clearly support this position. In the Gannon case the court said at page 794:

> "However, our interpretations certainly would not repeal the Scaffold Act as a civil remedy as plaintiff suggest. Any employee or other person injured by a wilful violation of the Act by any of the enumerated persons having charge of the structural work, still has an action against such a party. This is a very real remedy when we consider that structural work frequently involves the operations of several contractors or subcontractors who are each in charge of a phase of the work, and the injured party has a right

of action against any one of them, other than his employer who may wilfully violate or fail to comply with the Act."

In **Yankey v. Oscar Bohlin and Sons, Inc., 37 Ill. App. 2d 457, 186 N. E. 2d 57 (1962)**, the Court held that two parties were sufficiently in control of one project to make both liable under the Scaffold Act. Yankey was the employee of a trucking firm, not involved in the lawsuit. Bohlin was the general contractor on the job and had subcontracted a portion of the work to Northwestern Excavation. After the contract between Northwestern and Bohlin had been completed, Northwestern verbally agreed to furnish a crane and operator to Bohlin for the purpose of hoisting materials on the job. During the operations which Bohlin's employees supervised, the boom of the crane fell and injured Yankey. The Court held that even though Bohlin controlled the operator with orders and signals given by its supervisors, Northwestern was liable because it retained the right of control of the operator and the crane and the right of inspection of the crane.

In **Skinner v. The United States, 209 Fed. Supp. 424**, the Federal Court held that both the government and employer had control of the work so as to be in a position to require compliance with the Scaffold Act. In **Miller v. B. F. Goodrich Company, 295 Fed. 2nd 667 (1960)**, the Court of Appeals held that the owner, the B. F. Goodrich Company, had control co-existent with that of the employer of the plaintiff, and could require compliance with the act.

In **Rovekamp v. Central Construction Company, General No. 48965, Appellate Court of Illinois, First District, Third Division, 195 N. E. 2d 756**, the plaintiff, Rovekamp, brought an action under the Scaffold Act against the general con

tractor, Central Construction Company, who he alleged had charge of the work being done. Cent'l filed a third party indemnity complaint against a sub-contractor, Hines, who Central alleged had the immediate control and supervision of the scaffold from which Bovekamp fell. Hines moved for a motion to dismiss the third party complaint which the Trial Court granted. In reversing the decision, the Appellate Court stated:

> "Although the liability imposed by the Act does not rest upon negligence, there can be degrees of fault among those who, under the Act, are accountable to an injured plaintiff. Who is the more culpable, a party who supervises and coordinates the overall project, or a party who is responsible for the scaffolding and the particular work which produced the injury? Both are in charge of the work, to be sure, but of different phases of the work. Neither can escape liability to the plaintiff—thus the purpose of the Act is accomplished—but the lesser delinquent, if held accountable by the plaintiff, can transfer its statutory liability to the active delinquent, whose dereliction from duty brought about the plaintiff's injury."

In the instant case, the Court of Appeals had indicated by its opinion that the control necessary to impose liability under the Scaffold Act is an absolute compact thing which exists completely in one party to the exclusion of all others. This is not the intent of the Illinois Legislature and not the meaning of the Illinois case law. What is contemplated is that if one or more parties have sufficient control to require compliance with the Scaffold Act then those parties are under the provisions of the Act for the purposes of compliance and liability. The plaintiff does not contend that complete control was in the defendant, United States of America to the exclusion of other parties such as

Stanley Hanks Painting Company, but does contend that it had retained, by its contract, more than sufficient control to require them to take proper steps to prevent the occurrence which the Act was intended to prevent.

IV.

The Decision of the District Court and Court of Appeals Nullifies Illinois Scaffold Act by Holding That the Government Was Not in Charge of the Work Being Done Even Though the Government's Contract With the Petitioner's Employer Expressly Provided That the Government's Contracting Officer Retained General Direction of the Work.

The title of the Illinois Structural Work Act reads as follows:

> "An Act providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts, and other structures and to provide for the enforcement thereof."

The Scaffold Act, Ill. Rev. Stat., Ch. 48, Sec. 60-69, deals with highly dangerous activities and is a humane act enacted to protect persons working on and about construction projects. The Legislature placed obligations of compliance upon an owner, contractor, subcontractor, foreman or other person having charge of the work and imposed penalties, both civil and criminal, for the failure to comply with the provisions of the Act. The dangers which prompted the Legislature to pass the Act in 1907 exist today on a far greater scale because of the increase in construction, repairs and alteration of structures throughout the state. Since 1907 the Federal Government has become

far more active in its proprietary functions and of necessity has utilized the services of contractors and workmen on its installations. There is a compelling public need to keep the provisions of the Act alive and to give force to its provisions to protect the workmen both on private and government projects.

The District Court and the Court of Appeals have failed to follow the meaning and intent of the Scaffold Act and the pronouncements of the courts of Illinois when dealing with the liability to be imposed on the Government when acting as a general contractor on government owned installations. In denying tort liability in these situations, the Courts have failed to give full force and effect to government contract provisions. The District Court and the Court of Appeals have disregarded complete provisions or have distorted their meaning in deciding that the government really didn't intend what the plain meaning of the contract words indicate. The result is that strong contract provisions retaining broad powers in the government will be enforced when necessary to protect the government's interest, but will be diluted when liability may result against the government. The rationale of this decision denying tort liability is couched in words to the effect that the government's only purpose in including these provisions in the contract was to insure compliance with contract specifications.

In the instant case the defendant retained unusual powers over the control of safety of those working for the contractor. The defendant required the contractor to submit a written plan of his proposals effectuating the provisions of the contract concerning safety and to meet with the defendant's contracting officer to discuss and develop mutual understanding relative to the ad

ministration of the overall safety program. These powers went beyond that necessary to insure that the work was being done according to contract specifications. In effect the defendant was attempting to provide the same safety for workmen as did the Illinois Legislature in 1907 when it passed the Scaffold Act.

The Government need not have undertaken these powers to protect the safety of workers, but once having so done, it became incumbent upon the Government to make certain that proper safety procedures were followed. Retention of this control of safety engendered reliance by the contractor and by the workers, who saw Government inspectors on the job, that proper safety measures were being utilized. In these circumstances, failure to use proper safety measures became a failure of the defendant to fulfill its obligations under the contract and under the Illinois Law.

In addition to failing to give full force and effect to the wording of contracts between the Government and contractors, the Court of Appeals has imposed further conditions which repeal the Scaffold Act as a civil remedy against parties other than the employer. The Court of Appeals on page 765 of its opinion stated:

> "In our view, the provisions of the forty-two page contract between the United States and Stanley Hanks Painting Company relied upon by the plaintiff did not place the United States in charge of the painting projects being carried on at the Engineer Depot on August 21, 1956. As a matter of fact, the United States had no control of the hiring and firing of the Painting Company's employees. It had no control over the method in which the painting work was carried on. The fact that the United States had an inspector who, from time to time, inspected the

various painting jobs on the Depot, did not place the United States 'in charge' of the painting work."

The Court has imposed as a criteria for determining liability under the Scaffold Act an additional factor—who has the right to hire and fire employees. The fact as to who has the right to fire and hire employees is not the decisive factor in determining who has charge of the work. As a practical matter in any construction project, each contractor or sub-contractor brings his own employees to the job and has the right to fire and hire them. Other contractors may have the right to force the sub-contractor or contractor to move the employee from the work site, but he cannot compel him to remove him from his payroll. If, as the Court of Appeals indicates in its opinion, the right to hire and fire employees is decisive, then the right to bring a third-party action under the Scaffold Act would be completely abrogated. An employee of a sub-contractor could never bring an action against the general contractor for injuries he received as a result of a defective scaffold built by other employees of his employer. The question of whether the general contractor had the right to enforce compliance with the Scaffold Act would be immaterial because the general contractor had neither the right to fire or hire the employees of the sub-contractor. This interpretation is clearly against the intent of the Illinois Legislature and the interpretation of the Illinois Court.

The net result is that workmen on Government projects have been and will be in the future, denied the protection of the Illinois Scaffold Act. The District Court and the Court of Appeals by their decisions, have nullified the Act by giving the Government immunity from compliance with the Act.

CONCLUSION.

In conclusion, we believe that because a District Court and the Court of Appeals have nullified a State Safety Statute by disregarding the provisions of a contract between the Government and a contractor and because of the far-reaching effects upon future workers on Government and private construction projects, this decision should be reviewed by this Court.

Respectfully submitted,

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APPENDIX.

OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Filed March 3, 1964.

Duffy, Knoch and Swygert, Circuit Judges.
Duffy, Circuit Judge.

This suit was brought under the Federal Tort Claims Act (28 U. S. C., §§ 1346(b); 2671 et seq.; 2674). On August 21, 1956, the United States was the owner of certain premises in Granite City, Illinois, known as the United States Army Engineer Depot.

Stanley Hanks Painting Company entered into a contract with the United States for painting certain buildings in the Engineer Depot including Building 203. On August 21, 1956, plaintiff was working on Building 203 as a painter in the employ of Stanley Hanks Painting Company. He was painting outside windows and working on a scaffold. Plaintiff fell from the scaffold sustaining serious injuries.

The Structural Work Act (Ill. Rev. Stat. 1955, chap. 48, pars. 60 to 69), commonly known as the "Scaffold Act"[1] was enacted in 1907 to provide for the protection and safety of persons working in and about the construction and repair of buildings and other structures. The complaint alleged the defendant, United States, failed to comply with the provisions of this Illinois statute, and that such failure resulted in injuries to the plaintiff.

The District Court found for the United States and stated the Supreme Court of Illinois in **Gannon v. Chicago**,

[1] Referred to by the District Court and by several other courts as "Scaffolding Act."

Milwaukee, St. Paul & Pac. Ry. Co., 22 Ill. 2d 305, 175 N. E. 2d 785, adopted ". . . the now accepted test for liability of an owner under the Scaffolding Act, that is, that the owner must be 'in charge of' the work being performed by the plaintiff. Secondly, in the course of stating that proposition, the court adopts the first **Schmid** case[2] as the better expression of the law." The District Court commented that the same contractual provisions construed by the Court in the first **Schmid** case were also contained in the contract in the instant case.

The District Court specifically found "The United States of America was not in charge of the work being performed by the plaintiff at the time of the accident in question."

Section 9 of the Illinois Scaffold Act provides, in substance, that any owner or other person having charge of the erection, construction, repairing, removal or painting of any building shall comply with all the terms of the Act, and provides for a cause of action on the part of an injured person occasioned by the wilful violation of the Act.

The foreman and supervisor of the Stanley Hanks Painting Company testified he was in complete charge of the work being done on Building 203; that the scaffolding materials as well as the materials used by the painters were furnished by the Stanley Hanks Painting Company; that plaintiff as well as all other employees engaged in the painting at the Engineer Depot were hired and could be fired by Stanley Hanks Painting Company.

Nevertheless, plaintiff's counsel claims that the United States of America had the right to control the painting work on Building 203. With commendable zeal, counsel has combed the forty-two page contract and has cited various provisions which he claims prove the United States

[2] Schmid v. United States, D. C. E. D. Ill., 154 F. Supp. 81

of America was in charge of the work. Among such provisions are that the work will be conducted under the general direction of the contracting officer and that the work was to be subject to inspection. The testimony showed there was at least one inspector representing the United States on the Depot grounds who inspected Building 203 and other buildings where painting was in progress. There were other painting contractors engaged in the painting on the Depot grounds at the time Building 203 was being painted.

Other provisions cited by plaintiff's counsel were that the contracting officer may, in writing, require the contractor to remove an incompetent, careless or insubordinate employee, and that the contractor will comply with pertinent provisions of the manual safety requirements.

In applying Illinois law, as we must do in this case, we recognize that the Supreme Court of Illinois has changed its views on the question of ownership liability under the Illinois Scaffold Act. In **Kennerly v. Shell Oil Company** (1958), 13 Ill. 2d 431, 150 N. E. 2d 134, the court held an owner could be and was liable under the Act, notwithstanding the work was done by an independent contractor; that the Act fixed an independent, non-delegable duty of compliance upon the owner. The dissenting opinion expressed the view that only those owners, "having charge" of the work could be held liable.

In June 1961, the Supreme Court of Illinois decided **Gannon v. Chicago, Milwaukee, St Paul & Pac. Rv. Co.** 22 Ill. 2d 305, 175 N. E. 2d 785. Although not expressly so stating, the Court abandoned and overruled the **Kennerly** decision and embraced the views of the minority in that case. The opinion of **Schmid v. United States**, 154 F. Supp. 81 was cited with approval in **Gannon**.

In **Gannon**, after discussing the facts in that case, the Illinois Supreme Court said, 175 N. E. 2d at page 794

". . . Under these circumstances, it was at most a disputed question of fact whether the owner could be deemed to be in charge of the construction within the meaning of the act, and it would be the province of the jury, under proper instructions, to make that determination."

In our view, the provisions of the forty-two page contract between the United States and Stanley Hanks Painting Company relied on by plaintiff did not place the United States in charge of the painting projects being carried on at the Engineer Depot on August 21, 1956. As a matter of fact, the United States had no control of the hiring and firing of the Painting Company's employees. It had no control over the method in which the painting work was carried on. The fact that the United States had an inspector who, from time to time, inspected the various painting jobs on the Depot, did not place the United States "in charge of" the painting work.

In **Schmid v. United States**, 154 F. Supp. 81, the Court stated at page 9: "The fact that the United States sent its inspector to the project daily to inspect the work does not place the Government 'in charge of' the project. The Government had no control over the hiring or firing of the workmen. They had no control over the method in which the construction work or the repair work was being done, and they had no control over the firing of the workmen."

On the issue here involved, we think the District Court interpreted the Illinois Scaffold Act in accord with the most recent decision on that point by the Illinois Supreme Court.

The judgment of the District Court is

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 221

FRANK CANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an employee of the Stanley Hanks Painting Company, sued under the Federal Tort Claims Act, 28 U.S.C. 1346, for personal injuries sustained when he fell, while painting, from a scaffold at the Granite City, Illinois, Army Engineers Depot. Petitioner's employer had entered a contract with the United States for the painting of certain buildings in the Depot, including the building on which petitioner

was working when injured. It is undisputed that the defective scaffolding was furnished by Stanley Hanks.

The alleged basis for liability on the part of the United States was a violation of the Illinois Structural Work Act (Ill. Rev. Stat. 1955, Ch. 48, para. 60, 64 and 69), known as the "Scaffold Act." Petitioner contended below that portions of the contract between his employer and the United States, which provided that the work would be conducted under the general direction of the Contracting Officer and that the work was subject to inspection, placed the United States "in charge" of the work within the meaning of the Illinois statute, and thus cast responsibility for the safe construction and erection of the scaffolding upon the United States. Applying standards set forth in a recent decision of the Supreme Court of Illinois,* both the United States District Court for the Southern District of Illinois and the Court of Appeals for the Seventh Circuit determined that the United States lacked sufficient control of the day-to-day work for liability to attach under the Illinois statute.*

It is apparent from both the opinion below (Pet. App. 25-28) and the petition for certiorari that the question is solely one of the interpretation and application of State law. There is no occasion for review by this Court of the uniform resolution of that question by the two courts below, both of which are regularly concerned with matters of Illinois law. Cf.

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* *Gannon* v. *Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, 22 Ill. 2d 305, 175 N.E. 2d 785 (1961).

Estate of Spiegel v. *Commissioner*, 335 U.S. 701, 707-708.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JULY 1964.

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